

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HOCKERSON-HALBERSTADT, INC.,

Plaintiff,

v.

COSTCO WHOLESALE CORPORATION,

Defendant.

No. C03-1188L

ORDER REGARDING MOTION
TO EXCLUDE TESTIMONY

I. INTRODUCTION

This matter comes before the Court on plaintiff Hockerson-Halberstadt, Inc.’s. (“HHI”) Motion to Exclude Testimony and Supporting Memorandum (Dkt. #41). HHI seeks to exclude three of Costco Wholesale Corporation’s (“Costco”) witnesses from testifying at trial.

For the reasons set forth below, the Court denies HHI’s motion. The Court also notes that the findings and conclusions in this order, like all rulings *in limine*, are preliminary and can be revisited at trial based on the facts and evidence as they are actually presented. See, e.g., Luce v. United States, 469 U.S. 38, 41 (1984) (explaining that a ruling *in limine* “is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.”). Subject

ORDER REGARDING MOTION
TO EXCLUDE TESTIMONY

1 to these principles, the Court issues this ruling for the guidance of the parties.

2 **II. DISCUSSION**

3 Late in the afternoon on February 16, 2005, the date of the discovery cut-off, Costco
4 faxed a letter to HHI identifying three additional witnesses, Dr. Justin Wernick, Tom Rutlin, and
5 Scott McCoubrey. The letter stated, "Additional witnesses we may wish to call in this case are
6 listed below. Each may testify as to the use of Shoe Goo and similar products to modify shoes
7 before the critical date of the patent." HHI's Motion at Ex. 14. Costco's expert, Ray
8 Fredericksen, has opined that he used Shoe Goo to modify a shoe; he states that this use of Shoe
9 Goo supports Costco's claim of obviousness.

10 As an initial matter, HHI implies that the three witnesses are proposed experts; however,
11 it appears that they are fact witnesses. Their disclosure was therefore not untimely under the
12 Court's scheduling order. Furthermore, Costco states that it disclosed the witnesses within three
13 days after it learned of them. HHI's claim that it has been prejudiced by the late disclosure is
14 undermined by Costco's offer to allow HHI to depose the witnesses after the close of discovery.

15 HHI also argues that the witnesses' testimony should be excluded because it is neither
16 material nor relevant. HHI argues, "Testimony alone as to what someone *may* have been done
17 [sic] or remember doing at least 26 years ago in 1978 cannot satisfy the clear and convincing
18 evidence burden and ought to be excluded whether or not the witnesses were timely identified."
19 HHI's Motion at 3. Costco's burden in response to this motion, however, is not to show that
20 each witness's testimony will clearly and convincingly demonstrate that the '895 patent was
21 obvious. Rather, Costco must only show that the testimony is relevant to the issue of
22 obviousness, which it has done. Although testimonial evidence of invalidity must be
23 corroborated, each witness's testimony can be corroborated by the others and by that of Mr.
24 Fredericksen. See, e.g., Typeright Keyboard Corp. v. Microsoft Corp., 374 F.3d 1151, 1159
25 (Fed. Cir. 2004) ("Both physical evidence and oral testimony of a disinterested party can serve
26

1 to satisfy the corroboration requirement”).

2 **III. CONCLUSION**

3 For all of the foregoing reasons, the Court DENIES HHI’s motion to exclude testimony
4 (Dkt. #41).

5
6 DATED this 10th day of May, 2005.

7 

8 Robert S. Lasnik
9 United States District Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26